

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:
NATIONAL PRESCRIPTION
OPIATE LITIGATION

Case No. 1:17-md-2804
Cleveland, Ohio

CASE TRACK THREE

September 28, 2021
12:15 p.m.

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TRANSCRIPT OF FINAL PRETRIAL PROCEEDINGS,
BEFORE THE HONORABLE DAN A. POLSTER,
UNITED STATES DISTRICT JUDGE.

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1 TUESDAY, SEPTEMBER 28, 2021, 12:15 P.M.

2 THE COURT: All right. Please be seated,
3 everyone.

4 All right. This is a final pretrial in the
12:15:27 5 Track Three case. Opening statements are set for next
6 Monday. This is Lake County and Trumbull County against
7 Walmart, Walgreen's, CVS and Giant Eagle.

8 Counsel are all present and the client
9 reps, some of them are on the phone.

12:15:49 10 I've got a number of matters I want to
11 cover, and then if there's any additional items from
12 counsel, they can raise those.

13 All right. First, we're having jury
14 selection, we're going to be doing it in Courtroom 19-A,
12:16:12 15 in chambers tomorrow. The gallery is larger and so it's
16 safer to have a large number of prospective jurors.

17 When we go into chambers for individual
18 questioning, we'll have no more than two lawyers per
19 party so that's -- I guess that's 12 people.

12:16:33 20 Some months ago I told the parties that my
21 strong preference was to have only fully vaccinated
22 jurors. The plaintiffs readily agreed. The defendants
23 objected, arguing that doing so might skew the jury pool
24 against minorities, reduce the minority participation.

12:17:01 25 So I went forward.

1 The plaintiffs filed a bench brief a week
2 ago, again reiterating their strong argument against
3 seating unvaccinated jurors.

4 The defendants maintained an objection, but
12:17:23 5 then that objection seemed to grow weaker by the minute.
6 Defendants said they were going to file a brief, a motion
7 or argument, a brief, whatever, countering the
8 plaintiffs' brief, but they didn't do so.

9 Yesterday I was required to remove from the
12:17:45 10 jury pool an unvaccinated juror who contracted COVID,
11 which in my opinion validated my initial concern. And at
12 this point I want to know, do the defendants object to
13 excusing all unvaccinated jurors left in the pool?

14 I mean, what happened yesterday was
12:18:10 15 imminently predictable. Had it happened next week rather
16 than this week, it might have stopped the trial in its
17 tracks because all the jurors would have been sitting
18 next to someone who tested positive.

19 It's almost certain to occur over six or
12:18:28 20 seven weeks if we have an unvaccinated juror in that
21 pool, in that -- who is actually seated sitting there in
22 my courtroom among the 14 people.

23 So do the defendants object if I just
24 excuse the remaining jurors? There are about 20 who are
12:18:45 25 unvaccinated.

1 I did a little bit of an analysis myself of
2 these jurors. Obviously I don't know the race until I
3 see them, but I think there are 15 or 16 remaining
4 unvaccinated jurors in the 50 that we're planning to call
12:19:08 5 tomorrow.

6 I believe all but one is most likely -- one
7 or two -- Caucasian, and that's based on where they live,
8 Mentor, born in Germany, Ashland County, Middlefield,
9 Mentor, Ashland, Medina, Parma Heights, born in Ukraine,
12:19:36 10 Brecksville, South Amherst, Mansfield, Ashtabula, Medina.

11 All right. There's one
12 unvaccinated -- there's one unvaccinated juror who lives
13 on East 49th in Cleveland. I think there's a strong
14 likelihood based on that she's African American. There's
12:19:54 15 one in Euclid who may be African American. One in
16 Lorain, I'm not sure.

17 But the overwhelming number are Caucasian
18 so excusing them certainly won't skew the pool against
19 minorities. The overwhelming number, I believe, of the
12:20:12 20 unvaccinated jurors are Caucasian.

21 So do the defendants object to excusing the
22 remaining unvaccinated jurors? And if so, what is the
23 objection?

24 MR. LIVINGSTON: Yes, Your Honor. We
12:20:25 25 object.

1 THE COURT: Who is speaking?

2 MR. LIVINGSTON: Scott Livingston for Giant
3 Eagle.

4 And it's not just a question of a proper
12:20:35 5 cross-section racially, it's also a proper cross-section
6 age-wise and political biases.

7 *The New York Times* had an article this week
8 and it's pretty clear that far more conservative folks
9 tend to be unvaccinated than liberal folks.

12:20:54 10 THE COURT: That may be, but there's no
11 suspect class on being liberal or conservative.

12 MR. LIVINGSTON: But it's not a
13 cross-section, Your Honor.

14 I mean, imagine if this Court struck
12:21:04 15 everyone who was a registered Republican, that would
16 clearly not be proper.

17 And the same thing is true with respect to
18 age, Your Honor.

19 THE COURT: Well, I understand, but how do
12:21:12 20 I -- how do I balance the safety of the trial and the
21 likelihood that it will conclude?

22 Okay. Where does that come in?

23 MR. LIVINGSTON: We're already taking those
24 precautions, Your Honor.

12:21:24 25 As far as I know, this courthouse is

1 not -- does not prevent unvaccinated people from entering
2 the courthouse.

3 THE COURT: Correct.

4 MR. LIVINGSTON: So witnesses could be
12:21:32 5 unvaccinated. People today could be unvaccinated.

6 THE COURT: Well, I believe every lawyer is
7 vaccinated, and someone who is sitting --

8 MR. LIVINGSTON: We don't know. You're
9 assuming that.

12:21:43 10 THE COURT: That's up to -- I mean, sir,
11 that's up to you who you sit with at your table. If you
12 don't care, fine, it's up to you. That's voluntarily.

13 MR. LIVINGSTON: No, but I don't know if
14 the other lawyers are vaccinated or not.

12:21:55 15 I don't have any choice. I'm in this
16 courtroom because I have to represent my client for the
17 next two months.

18 THE COURT: But you choose to be.

19 If you're not vaccinated and the people
12:22:03 20 sitting with you object to that, you wouldn't be here,
21 sir.

22 Another lawyer would be here.

23 MR. LIVINGSTON: All right. But the Chief
24 Judge of this Court is not, as a result of safety,
12:22:16 25 barring people who are unvaccinated, including the

1 jurors.

2 THE COURT: Okay.

3 MR. LIVINGSTON: Including the jurors.

4 Why were the jurors summoned if it was true
12:22:26 5 as a safety measure --

6 THE COURT: All right. So your concern is
7 age and political bias. Again, not suspect class.

8 MR. LIVINGSTON: We want a cross-section,
9 Your Honor.

12:22:33 10 We want -- you're going to -- of the 50
11 jurors tomorrow, you're planning on excusing one-third of
12 them because they're not vaccinated.

13 I don't see how that's a proper
14 cross-section of the community. If the real concern --

12:22:46 15 THE COURT: All right. What
16 happens -- what do I do, and if I would -- if I would
17 proceed and if this trial has to be stopped because one
18 of the jurors gets COVID, how do I -- what are
19 your -- what are the defendants willing to accept or do
12:23:10 20 as a result? Since you're essentially asking all of us
21 to bear that risk.

22 MR. LIVINGSTON: Well, the New York trial
23 is in, like, day 40, and the trial in the Track Two went
24 the distance.

12:23:22 25 I mean, there's always a risk of a COVID

1 outbreak in any situation, vaccinated or unvaccinated.

2 So --

3 THE COURT: Sir, the vaccination rate in
4 New York was 80 percent. Here it's 50 percent.

12:23:34 5 MR. LIVINGSTON: We just have to deal with
6 that situation as it comes.

7 THE COURT: Why?

8 MR. LIVINGSTON: I mean, if the real
9 concern is safety, if that's the real concern, then we
12:23:42 10 should hold off on having this trial until we don't have
11 an issue with COVID any more.

12 THE COURT: We've postponed it twice for a
13 year.

14 COVID is here forever.

12:23:53 15 MR. LIVINGSTON: We are more anxious, Your
16 Honor. We are more anxious than you to get to a jury on
17 this.

18 THE COURT: All right. Does anyone else
19 want to say anything about any objection to excusing the
12:24:07 20 unvaccinated jurors?

21 (No response).

22 THE COURT: All right. So race isn't the
23 issue. It's now age and political bias.

24 I mean, we've got older jurors,
12:24:19 25 that's -- you know, I don't -- I'm not sure they, from

1 looking, I didn't look at the age but we've got young
2 jurors, we've got old jurors, vaccinated, unvaccinated.

3 That's -- and can you articulate for me why
4 you think your clients would be prejudiced if -- assuming
12:24:53 5 you're correct, just assuming you're correct that out of
6 the -- say we have 20 jurors, roughly 20 jurors who are
7 unvaccinated, say that splits two-to-one conservative
8 versus liberal, all right, and remember, we're -- you
9 know, how would your client be prejudiced?

12:25:14 10 MR. LIVINGSTON: We don't know for sure,
11 but we do know that --

12 THE COURT: Well, if you're not prejudiced,
13 then it doesn't matter. You've got to articulate a
14 prejudice.

12:25:25 15 MR. LIVINGSTON: Our jury consultants tell
16 us that people who are very conservative and who are
17 unvaccinated are very big on individual rights and
18 responsibilities, and they view people who -- tend to
19 view people who are, you know, have issues with drugs as
12:25:44 20 having to take responsibility for that -- for their own
21 situation and not try to blame others for their
22 situation.

23 So we think that that kind of person, all
24 else being equal, might tend to be more favorable to our
12:26:01 25 position. And, of course, that's why the plaintiffs

1 don't want those folks on the jury.

2 It has nothing to do with safety, in my
3 view. If people who are -- who come to this courthouse
4 and have been vaccinated are worried about sitting next
12:26:15 5 to an unvaccinated juror, then excuse that person because
6 they obviously have a very big fear of being in a
7 courtroom with people who are unvaccinated, who aren't
8 vaccinated.

9 MR. WEINBERGER: Your Honor, Peter
12:26:32 10 Weinberger.

11 Can I respond?

12 THE COURT: Yes.

13 MR. WEINBERGER: So the argument that
14 you're hearing is that they want jurors who are biased in
12:26:45 15 their favor, and they view the --

16 THE COURT: Well, I mean to be --

17 MR. WEINBERGER: Well, I mean, that's what
18 I heard articulated, Your Honor.

19 THE COURT: Well --

12:26:55 20 MR. WEINBERGER: Now, as far as --

21 THE COURT: Mr. Weinberger, if, in
22 questioning, the juror in any way exhibits any
23 bias -- we've already excluded anyone who has a leaning
24 for or against a pharmacy. Okay? They've been excluded.
12:27:10 25 Even a mild leaning for or against a pharmacy, they've

1 been excluded.

2 I don't believe -- and again, what was your
3 name?

4 MR. LIVINGSTON: Scott Livingston.

12:27:19 5 THE COURT: All right. Mr. Livingston,
6 he's not going to get a juror who in any way manifests a
7 bias toward defendants, they'll be struck, stricken.

8 But he thinks they may have some general --
9 we'll call it libertarian leanings -- personal
12:27:41 10 responsibility leanings, and they may tend to think that
11 someone who got addicted or died of an overdose, it was
12 their fault as opposed to someone else's.

13 MR. WEINBERGER: So --

14 THE COURT: I think that's how he
12:27:55 15 articulated it.

16 MR. WEINBERGER: So let's look at the other
17 shoe here and let's look at -- and I'm assuming that
18 their jury consultants have analyzed the list of
19 vaccinated jurors, which at this point there are
12:28:11 20 approximately 60 -- 58 of them.

21 You know, I haven't -- I haven't heard
22 anything --

23 THE COURT: Excuse me a second.

24 Let me asking Mr. Livingston, I'm going to,
12:28:22 25 you know, play Devil's advocate.

1 Liberal jurors, democratic jurors who are
2 vaccinated, they may -- the consultants probably are
3 telling you the opposite, all right? They, you know, may
4 think it's not necessarily an individual's fault if he or
12:28:44 5 she got addicted, and they might be more willing to look
6 at, say, someone else's responsibility.

7 All right. Why should those people be
8 stricken, any of those who say "I don't want to sit next
9 to an unvaccinated juror"? If I strike all of those
12:29:00 10 people, then I'm skewing the jury against the plaintiffs.

11 MR. LIVINGSTON: No, I think there's a
12 difference, Your Honor.

13 I was only suggesting that if a juror said,
14 "Your Honor, I'd really ask you to excuse me because I
12:29:16 15 just don't feel comfortable," that's different than the
16 Court issuing a rule saying that "Regardless of
17 individual concerns and preferences, if you're not
18 vaccinated, you're out, or if you are vaccinated, but
19 feel concerned, you know, then I'll just automatically
12:29:33 20 take you out."

21 I think you leave it up to the person,
22 right?

23 THE COURT: Well, I've done that.
24 Anyone -- anyone who has expressed a strong concern for
12:29:42 25 his or her safety, we've already excused.

1 But I'm saying there are still jurors, and
2 I bet that if I bring all those jurors in back into my
3 chambers and look them in the eye and I say, "Are you
4 comfortable sitting next to an unvaccinated juror for six
12:29:57 5 or seven weeks," I bet a whole lot of them are going to
6 say no, and then I'll have to excuse them.

7 And that tips the jury the other way.
8 Right? That tips the jury the other way. That isn't
9 right.

12:30:10 10 MR. LIVINGSTON: I think the difference is,
11 Your Honor, Mr. Weinberger is asking you to excuse a very
12 large segment of the jury pool.

13 We are not asking you to excuse any segment
14 of the jury pool. You know, a priority, we're saying let
12:30:25 15 them come in. If they make the cut, they make the cut.
16 If they don't make the cut, they don't make the cut, but
17 don't put out a rule that saying --

18 THE COURT: I'm not saying there's
19 anything -- they are biased.

12:30:37 20 I'm saying they are creating a safety risk
21 for the other jurors. I'm not saying that there's
22 anything wrong with their views, that they can't be fair
23 and impartial.

24 That's not why I'm excusing them at all. I
12:30:50 25 have no idea what their views are. Maybe some of them

1 are libertarian, maybe some aren't. I mean, I don't
2 know.

3 But I'm -- the reason I'm excusing them is
4 because they're putting everyone at risk, particularly
12:31:02 5 their fellow jurors. And given that we now have proof
6 positive one of those people, who very well could have
7 been seated had we done this a week earlier, that person
8 would have been on the jury and infected everyone.

9 MR. LIVINGSTON: Your Honor,
12:31:17 10 there's -- every day we all encounter these risks. We
11 encounter vaccinated and nonvaccinated people.

12 THE COURT: I understand that, but the
13 risk -- the risk of a vaccinated juror getting COVID is
14 about one-tenth of unvaccinated so.

12:31:30 15 MR. LIVINGSTON: But, Your Honor, basically
16 you're creating a Judge Polster rule for this courtroom
17 that is different than the rule that applies to this
18 courthouse.

19 We don't think that's right, Your Honor.

12:31:42 20 THE COURT: Well, there's a lot -- a lot
21 difference between a six-week trial and the one and
22 two-day trials that I've been conducting, Mr. Livingston.
23 I've been conducting one, two, three-day criminal trials.

24 MR. LIVINGSTON: Your Honor, cases have
12:31:56 25 been going on for a lengthy period of time in the

1 courthouse. They don't have a problem.

2 THE COURT: Well, Judge Barker has already
3 lost three, okay. I don't know if she even inquired
4 about vaccinated or unvaccinated, all right? But that
12:32:08 5 was -- but she's already lost three jurors.

6 I don't know if any of them have actually
7 tested positive for COVID, and maybe she did require them
8 to have vaccinations.

9 Judge Gwin has been requiring -- Judge Gwin
12:32:20 10 required -- I mean, would not seat an unvaccinated juror,
11 right on, you know, on the other side of the hall. So he
12 took that position himself and he did it. And those were
13 short criminal trials.

14 So there is a precedent in our courthouse.

12:32:37 15 MR. LIVINGSTON: Your Honor, we're, like I
16 said --

17 THE COURT: And that was a criminal case
18 where you've got, you know, the constitutional
19 protections.

12:32:44 20 So it's --

21 MR. LIVINGSTON: You're excusing -- well, I
22 think we are entitled to a cross-section of the
23 community. And when you exclude 30 percent of the
24 community, you no longer are going to get a cross-section
12:32:56 25 of the community.

1 There's no way around that fact. And what
2 you're saying is --

3 THE COURT: I disagree with that.

4 MR. LIVINGSTON: -- with these concerns of
12:33:04 5 safety, which if it's that big of a concern then we
6 should hold off on the trial.

7 We're not suggesting that. All we're
8 suggesting is allow jurors who are unvaccinated to be
9 considered. That's all we're asking.

12:33:15 10 Don't treat them like second-class
11 citizens.

12 THE COURT: They're not being treated like
13 second-class citizens.

14 All right. Guess what? I mean, there are
12:33:29 15 now rules that require, I mean Government employees,
16 federal executive branch employees either have to get
17 vaccinated or tested or they lose their jobs. Many
18 employers, Metro, okay, you can say they are being
19 treated as second-class citizens or you can say they are
12:33:49 20 being required to shoulder their collective
21 responsibility.

22 MR. LIVINGSTON: We have a rule in my
23 office: If you want to continue to work at my law firm
24 you have to get vaccinated.

12:33:57 25 THE COURT: Okay.

1 MR. LIVINGSTON: Very different situation.
2 That's a job that's at issue.

3 President says, "If you're going to be a
4 federal employee working for me, you have to get
12:34:05 5 vaccinated."

6 These jurors don't work for the U.S.
7 Government. They are ordinary citizens.

8 THE COURT: No, but they are being ordered
9 by the United States Government that they need to serve
12:34:13 10 as jurors.

11 MR. LIVINGSTON: There is no Federal Rule
12 that says anybody who walks into a federal building,
13 including a Federal Courthouse, must be vaccinated. And
14 I don't think it would get very far.

12:34:22 15 THE COURT: There may be one in the future,
16 and if so, it's certainly lawful.

17 I mean, if Judge Gaughan decides or we, we
18 as -- if we as a Court decide that people don't come in
19 unless they're vaccinated, we can do it.

12:34:34 20 MR. LIVINGSTON: You can do it, and
21 somebody could challenge it and appeal it, and ultimately
22 it would probably go to the Supreme Court.

23 THE COURT: They'd lose. They'd lose if we
24 do it for safety.

12:34:44 25 So, all right, Mr. Weinberger, anything

1 else you wanted to say?

2 MR. WEINBERGER: No, Your Honor.

3 THE COURT: Well, I'm going to think about
4 it.

12:35:07 5 Well, let me ask you this, Mr. Livingston:
6 What consequence should there be against the defendants
7 if I -- if I -- if I accede to your objection and go
8 ahead and we have to stop the trial because an
9 unvaccinated juror gets COVID during this trial, what
12:35:34 10 consequence is Giant Eagle and the other defendants
11 willing to bear?

12 MR. LIVINGSTON: We would have to have
13 a -- there would need to be a pause in the trial until we
14 could resume.

12:35:48 15 Judge, what are we going to do if a
16 vaccinated juror gets COVID?

17 THE COURT: I don't know. We'll have to
18 deal with it.

19 MR. LIVINGSTON: And who are we going to
12:35:57 20 punish for that? Nobody, of course.

21 THE COURT: Right.

22 But this is different. This is something
23 that you're choosing, all right, and you're -- you're
24 pushing hard against me to take a reasonable, what
12:36:09 25 everyone -- look, you're a smart person, Mr. Livingston.

1 You're not telling me that there isn't a far greater risk
2 of a problem and a juror getting COVID if he or she's
3 unvaccinated than vaccinated.

4 Correct?

12:36:24 5 MR. LIVINGSTON: No, I --

6 THE COURT: Okay.

7 MR. LIVINGSTON: I --

8 THE COURT: Okay. You know that.

9 So what, what consequence is your client
12:36:36 10 willing to bear, along with the other defendants, if, if
11 a vaccinated -- if an unvaccinated juror gets COVID?

12 You better caucus with -- have you talked
13 to your CEO?

14 MR. LIVINGSTON: Your Honor, do you have
12:36:51 15 something in mind as to what the consequence would be?

16 THE COURT: I'm asking you.

17 The consequence could be that this trial
18 has to be stopped, okay. So certainly -- I mean, I
19 certainly would -- at a minimum, the defendants would
12:37:06 20 have to bear all the costs of the plaintiffs for the
21 trial up to that date because it would have to be redone
22 at a minimum.

23 I mean, that's what I'm -- that's what I'm
24 talking about.

12:37:20 25 Have you talked to your clients? Are they

1 willing to bear those costs?

2 MR. LIVINGSTON: Well, since we think -- I
3 mean again, Your Honor --

12:37:28

4 THE COURT: Well, have you talked to your
5 client about that?

6 MR. LIVINGSTON: A way to avoid this issue
7 is to delay the trial.

8 THE COURT: We're not delaying the trial.
9 We're going forward.

12:37:38

10 MR. LIVINGSTON: If a vaccinated juror gets
11 COVID, should the plaintiffs pay the defendants' costs?

12 THE COURT: I've heard enough.

12:37:50

13 In short order, you've got your clients
14 here, I want to know if the defendants -- if I accede to
15 what -- I mean, let me ask you, is Mr. Livingston
16 speaking alone? His client is Giant Eagle.

17 What about Walmart, Walgreen's and CVS? Do
18 you all concur with that?

19 MR. MAJORAS: Your Honor, John Majoras.

12:38:07

20 We concur with the, if I may, Your Honor,
21 we certainly concur with the idea that you had reached
22 the other day about bringing in jurors and finding out
23 greater circumstances.

12:38:23

24 We're not experts in health and, for
25 example, if a juror were to come in and say they're not

1 vaccinated but they have suffered from COVID before, is
2 that immunity something that makes a difference? I
3 suspect it does, but I'm not a doctor, I'm not trying to
4 say that.

12:38:38 5 Again, with all due respect, Your Honor,
6 your discussion of the prospective jurors and where they
7 live, I think those are certainly observations. I know
8 this community as well. Those are observations one can
9 make, but they are not definitive in terms of identifying
12:38:49 10 whether we're going to get the full cross-section of
11 jurors that we're entitled to or a panel that we're
12 entitled to.

13 In terms of the discussion about is there
14 some punishment the defendants should bear from having
12:39:01 15 their right to have a cross-section of the population for
16 their jurors, I don't think there should be any
17 punishment for exercising that right or asking for that
18 right, Your Honor.

19 I think if someone were to become sick,
12:39:12 20 whether it's any of the lawyers here, whether it's any of
21 the jurors, vaccinated or unvaccinated, I think the Court
22 will be faced with a question of what to do with the
23 trial.

24 We recognize there's a risk of that, but I
12:39:23 25 think, as Mr. Livingston said and even as Mr. Lanier said

1 the other day, there are people who have been vaccinated
2 that come down with COVID.

3 THE COURT: Understood.

4 MR. MAJORAS: None of us know that in
12:39:33 5 advance.

6 I think trying to assess that some party is
7 to be blamed for that is not a proper way to determine
8 whether we have a right to the jurors that are a
9 cross-section of the community.

12:39:46 10 MR. BUSH: Your Honor, Graeme, Graeme Bush
11 for CVS, and I'm not going to belabor the point.

12 I agree with Mr. Majoras. We want a
13 cross-section. We don't think there's any basis for
14 punishing any party if things turn out badly.

12:40:01 15 THE COURT: It's not punishing. It's
16 that --

17 MR. BUSH: Well --

18 THE COURT: -- if you required, required
19 everyone to take an unnecessary risk because you feel
12:40:14 20 that somehow it would -- it would excuse jurors who might
21 be favorable to you, and then it turns out that that risk
22 happens, it's just a financial consequence. All right?

23 That's not a punishment. It's just the
24 corollary flow from it.

12:40:30 25 MR. BUSH: To use your words, Your Honor,

1 we don't think there's any basis for that.

2 THE COURT: Well, I do.

3 MR. BUSH: And second of all, all that's
4 happening here, as Mr. Livingston said, is we're asking
12:40:39 5 that we have a fair cross-section of the jury pool and
6 see where -- and that's just to bring them in so that we
7 can come listen to what they have to say, listen to what
8 they say in chambers.

9 THE COURT: It's probably better to stay
12:41:02 10 seated. I think it works better if you're seated. I
11 don't know.

12 MR. BUSH: Okay. Maybe we'll end up with a
13 jury after that process that doesn't present any of these
14 problems, but we don't think we should foreclose people
12:41:14 15 from sitting on the jury on the basis of risk that may or
16 may not exist from being unvaccinated.

17 But as I said before, I agree with
18 Mr. Majoras.

19 MR. SWANSON: Your Honor, just briefly,
12:41:41 20 Brian Swanson for Walgreen's.

21 I have nothing to add except to say that we
22 join with our co-defendants on this issue.

23 THE COURT: Well, Mr. Majoras articulated a
24 slightly different position which is a wait-and-see and
12:42:03 25 bring the jurors in and see if, you know, if, in fact,

1 I'm right, that excluding unvaccinated jurors does not
2 skew the pool against minorities.

3 I agree, it's a -- I've taken a guess, a
4 reasonable guess. It could be wrong.

12:42:19 5 Well, I will think about it. I may -- I
6 may just proceed with the 50 we have.

7 We, you know, had to take several off
8 for -- obviously the one juror who had COVID. There were
9 several who had serious job-related issues. One juror
10 had serious anxiety issues about being a juror.

11 Obviously I wasn't going to bring her in.

12 I don't know. We can see what things look
13 like. Obviously we're taking some risk bringing
14 unvaccinated jurors and sitting in -- I mean, we're going
15 to try and socially distance the jurors several feet
16 apart, but I think the defendants' argument would almost
17 evaporate if I get a substantial number of the vaccinated
18 jurors saying that they are -- feel very uncomfortable
19 serving with vaccinated -- with unvaccinated jurors
12:43:00
12:43:29 20 because then I think we -- you know, I have to do one or
21 the other.

22 I can't be totally unfair to the plaintiffs
23 to excuse all of those people.

24 So --

12:43:38 25 MR. LIVINGSTON: Your Honor, just so we're

1 making sure, it's not our position -- we are not
2 suggesting that you exclude any group of people,
3 vaccinated or unvaccinated.

4 And --

12:43:48 5 THE COURT: No, but, Mr. Livingston, I
6 can't -- you're suggesting I just say to someone, "Well,
7 tough for you. You're uncomfortable sitting next to an
8 unvaccinated juror? Tough. I'm ordering you to serve."

9 MR. LIVINGSTON: I mean, you'll have to see
12:44:02 10 how many people say they are uncomfortable sitting next
11 to an unvaccinated person.

12 It might only be one or two.

13 THE COURT: I understand. Well, I'll see.

14 If it turns out to be a substantial number,
12:44:12 15 then it would be unfair to the plaintiffs to keep the
16 unvaccinated jurors and exclude all of those people.

17 MR. LIVINGSTON: So there is a fairness
18 issue there. That's the whole point, Your Honor.

19 If you exclude one group, then either the
12:44:25 20 plaintiffs or the defendants will be prejudiced.

21 THE COURT: That's your theory. That's
22 your theory.

23 I'm just saying that under your theory, you
24 have to concede that to do that would be -- would be
12:44:37 25 skewing the jury pool against the plaintiffs and in favor

1 of you.

2 And you can't -- I mean, you may want that,
3 but that's certainly not a principle that I will do.

4 MR. LIVINGSTON: We don't want that. We're
12:44:48 5 saying the jurors should not be -- no group should be
6 excluded.

7 THE COURT: I understand. I understand.
8 But the direct corollary of what you've said is that if
9 it turns out that there are a substantial number of
12:45:01 10 vaccinated jurors who say they are very, very
11 uncomfortable sitting on a jury with unvaccinated ones,
12 then I have two choices: I either say "Tough for you,
13 you've got to do it and I'm ordering you to," or I've got
14 to excuse them, and then I'm skewing the jury in your
12:45:20 15 favor.

16 Now, you may want that, but you
17 can't -- that's a losing argument.

18 MR. LIVINGSTON: But you're going to get --
19 the vaccinated people will be a group, and only a small
12:45:29 20 segment, presumably, of that group might have the concern
21 you just articulated.

22 THE COURT: Well, but if it's a third of
23 them, then you have 15 and 10, then you've got about the
24 same number.

12:45:40 25 So I'm just saying, all right, that in the

1 pool of the first 50, 35 I think are vaccinated, 15
2 aren't, so more than two-thirds are vaccinated.

3 All right. Well, I'll take this under
4 advisement and if, if we proceed with these, I'm going
12:45:58 5 to --

6 MR. LIVINGSTON: Your Honor, one --

7 THE COURT: -- adopt Mr. Majoras's view and
8 see, see what they say and see what race they are, and
9 then make a decision at that point.

12:46:10 10 MR. LIVINGSTON: Your Honor, just one last
11 thought I would leave the Court with on this issue which
12 is that we share the concern that if obviously a COVID
13 outbreak hits this trial, the parties will all have
14 expended a tremendous amount of resource. And it's
12:46:26 15 possible we will either have to suffer a long delay or
16 redo.

17 But ultimately, Your Honor, if you agree to
18 not exclude any segment of the jury pool, there's no
19 appeal issue there.

12:46:36 20 If you all of a sudden decide, "Nope,
21 anybody who is unvaccinated is off my jury pool" and the
22 Sixth Circuit ultimately later on decides that you were
23 wrong, then we've got to do this all over again.

24 THE COURT: Well --

12:46:51 25 MR. LIVINGSTON: And that would be the

1 worst possible outcome.

2 THE COURT: No, the worst possible outcome,
3 Mr. Livingston, is if I adopt your view -- and it's not
4 yours, it's substantially joined by the other
12:47:07 5 defendants -- and an unvaccinated juror gets COVID and as
6 a result one of the vaccinated jurors gets COVID and gets
7 real sick and, God forbid, dies.

8 That's the worst consequence. And I'd have
9 to live with it because it would be my decision.

12:47:27 10 Okay? I'd live with it the rest of my
11 life. That would be a hell of a lot worse than doing
12 this trial two or three more times.

13 That's just money.

14 MR. LIVINGSTON: And that horrible
12:47:40 15 scenario, Judge, that you just articulated could happen
16 regardless.

17 THE COURT: Of course it could happen
18 regardless, but we deal with probabilities. All right?
19 We make decisions.

12:47:50 20 You do it all the time. You get the facts
21 and you try to be as safe as possible, recognizing that
22 there's no -- you can't completely insulate yourself and
23 get perfect safety, which is why I'm sure you got
24 vaccinated. Okay? Because it makes sense to do it.

12:48:09 25 MR. LIVINGSTON: Right.

1 THE COURT: Could you get COVID? Of
2 course. But you've got a 10 or 20 times more likelihood
3 of getting it if you're not vaccinated, so that's why we
4 got vaccinated; a collective responsibility.

12:48:23 5 MR. LIVINGSTON: We're balancing a very
6 important right, Your Honor, which is a right when you
7 are in a Federal Courthouse and in a federal courtroom in
8 front of a Federal Judge that you have a right to a jury
9 of your peers; i.e., a cross-section of the community.

12:48:40 10 And if you're saying that because of safety
11 we don't get that, that's just not right, Your Honor.

12 THE COURT: All right. I understand the
13 argument, and again it's a balance. I mean --

14 MR. WEINBERGER: Your Honor.

12:49:03 15 THE COURT: I mean, this is why we had no
16 trials at all for a year. Okay? We had no trials at
17 all, because, you know, we couldn't do them safely. We
18 couldn't, you know, couldn't do them safely at all.

19 So it's a balance. Now we're doing them.
12:49:16 20 We're trying to do them safely. So, all right.

21 MR. WEINBERGER: Your Honor, may I just
22 respond for just a moment?

23 THE COURT: All right.

24 MR. WEINBERGER: Peter Weinberger.

12:49:24 25 We join in the Court's concern and the

1 balancing that must be -- that must take place in favor
2 of the safety of the jurors and the safety of everyone
3 else in this courtroom.

4 I haven't heard Mr. Livingston or anyone
12:49:44 5 else from the defense state that the non -- that the
6 vaccinated jurors do not represent a cross-section of the
7 community, whatever that means.

8 Now, you know, they can say their jury
9 consultant has told them this or that. If you look at
12:50:05 10 the jury questionnaires, now that we have landed on about
11 78 total jurors, and you look at the jurors who are
12 vaccinated, there is, as a group, in terms of what
13 communities they come from, in terms of whether -- what
14 jobs they hold, and in terms of any other information
12:50:31 15 that has been obtained, there is not any evidence to
16 suggest that they don't represent a cross-section of the
17 community.

18 THE COURT: Well, I think you're probably
19 right, but I, you know, I understand. You know, I read
12:50:52 20 the same things Mr. Livingston has.

21 There's a big article in *The New York Times*
22 today with a line that shows -- that correlates states'
23 vaccination rates with how the majority of those citizens
24 voted in the last presidential election.

12:51:09 25 I saw it. That's the first thing I read

1 today. So I understand the argument.

2 So maybe the best thing to do is bring in
3 the 50 and we'll see, and if --

4 MR. WEINBERGER: I mean, one could argue,
12:51:24 5 Your Honor, that nonvaccinated jurors don't trust
6 pharmaceutical companies.

7 I mean, you can speculate.

8 THE COURT: Or don't trust doctors. Again,
9 I threw that out.

12:51:35 10 I don't know why pharmacies that are basing
11 their defense on the fact that their individual
12 pharmacists shouldn't -- or should have trusted doctors
13 would want a whole bunch of people who don't trust
14 doctors, but, you know, I don't know.

12:51:52 15 If I decide to go forward and bring them
16 in, I will take a good, hard look and see, see who we
17 have left after any for-cause challenges tomorrow, and
18 decide what to do.

19 All right. We had a very unfortunate
12:52:08 20 incident involving a big screen that the plaintiffs
21 wanted to have. I had made it clear to my staff multiple
22 times that I didn't want it, and I would only consider it
23 if all parties, all defendants wanted it as well.

24 People started putting it up yesterday.
12:52:31 25 It's now down.

1 All right. I want to make it clear: I
2 control everything in this courtroom. If someone wants
3 to put something in, install something, whatever, they've
4 got to get my permission.

12:52:44 5 If they don't have my permission, it
6 doesn't happen.

7 If someone does this again, there's going
8 to be some very hefty fines, hard and fast. No hearing,
9 no nothing, it will just happen. So we're not having any
10 more of that.

11 MR. WEINBERGER: Your Honor, may I just
12 address that?

13 THE COURT: I've moved on. All right.

14 MR. WEINBERGER: I just wanted --

12:53:04 15 THE COURT: It's not going to happen again.

16 MR. WEINBERGER: I just wanted to express,
17 with all due respect, Your Honor, our sincerest apologies
18 for what occurred yesterday.

19 It was -- it was not because we acted or
12:53:16 20 anyone on our side acted to or intended to contravene any
21 directive of yours or of your staff.

22 We misunderstood, in the context of what
23 you said earlier, which is if all the -- all the parties
24 agreed and you agreed to the large screen, we understood
12:53:40 25 that if we put it up just to see what it looked like, not

1 that we were attempting to control the courtroom or in
2 any way contravene your order, that it would be -- it
3 would give everyone an opportunity, including yourself
4 and your staff, to see how it looked and how it operated.

12:54:00 5 We did that as a result of a
6 misunderstanding. We apologize for that.

7 And I can assure you --

8 THE COURT: Apology is accepted, but the
9 directives were very clear, and it wasn't to go up. All
12:54:15 10 right? So it was unambiguous and it was multiple times.
11 So if it happens again, there will be some direct and
12 dire consequences.

13 All right. Time limits for opening
14 statements.

12:54:33 15 I want to know how much time each side
16 feels it reasonably needs.

17 All right. I want to know. I guess,
18 first, Mr. Lanier, I guess if you're doing the opening,
19 what -- I mean, how much time are you requesting?

12:54:48 20 MR. LANIER: Your Honor, I would request
21 two-and-a-half hours.

22 And I can break that apart as to why I need
23 it.

24 THE COURT: No, you don't have to break it
12:55:00 25 apart.

1 Two-and-a-half hours.

2 MR. LANIER: Yes, sir.

3 THE COURT: That's a very long opening. I
4 mean, I know you're a darn good lawyer, but I don't know
12:55:10 5 too many people who can hold anyone's attention for
6 two-and-a-half hours.

7 If you're the first I've seen, more power
8 to you. But, all right, so you want two-and-a-half
9 hours.

12:55:20 10 Well, I guess from the defendants, I guess
11 how much time do you want, either individually or
12 collectively? And again we're not going to have
13 repetition so, I mean, each defendant doesn't have to say
14 the same thing.

12:55:45 15 I mean, there are some things that are
16 going to apply to all of you and you don't need to have
17 four people say that. I'm not going to have that. But I
18 guess collectively, and again here, you know, if I give
19 the defendants a collective amount, you can split it how
12:55:58 20 much you want.

21 If a person wants to take 50 percent of it
22 because he or she is saying a number of things for all of
23 you, that makes sense. So collectively, what do you
24 think is reasonable?

12:56:09 25 MR. STOFFELMAYR: Judge, Kaspar

1 Stoffelmayr. I'll stay seated, if that's all right.

2 THE COURT: It works better. The

3 microphones work better if you do.

4 MR. STOFFELMAYR: Is it all right if I take

12:56:19 5 my mask off?

6 THE COURT: If the lawyer is speaking, he

7 or she can take the mask off.

8 MR. STOFFELMAYR: Thank you.

9 We were happy with your original proposal

12:56:26 10 that was 45 minutes per party.

11 As you suggested, we --

12 THE COURT: That's three hours.

13 MR. STOFFELMAYR: -- talked about

14 reallocating time to avoid repetition, so it wouldn't be

12:56:35 15 literally 45 minutes, 45 minutes. It might be 45

16 minutes, you know --

17 THE COURT: Again, you can -- if I give

18 three hours, I don't care how you split it up or allocate

19 it. If one person wants to speak for two, and the others

12:56:48 20 15 minutes, that's fine. I don't care.

21 MR. STOFFELMAYR: And we've also discussed,

22 you know, the points you raised that three hours is a

23 very long time for jurors to have to listen to even

24 multiple people, and we would certainly like to try to

12:57:00 25 shorten that.

1 I don't know that we could commit today
2 that we'll be able to get it to any particular time, you
3 know, lower than that, but, you know, with the --

4 THE COURT: All right. This is a little
12:57:13 5 longer than I had envisioned, but it's, you know, the
6 three hours, which is pretty much what I had allocated
7 anyway for the defendants.

8 All right. Mr. Lanier, I'll give you up to
9 two-and-a-half hours.

12:57:28 10 I'm urging you to condense it, and I'm not
11 suggesting that you actually speak for two-and-a-half
12 hours, but if you want to, you can do it. And the
13 defendants will have three hours collectively. However
14 you allocate it is up to you, and that's fine.

12:57:46 15 We'll figure out, depending I may have, you
16 know, depending how long the first defendant's argument
17 is, I may -- I may have -- may have time to have the
18 first defense argument and then break for the evening.

19 We're obviously -- if we're starting at
12:58:11 20 1:00 o'clock, we're not going to go for five or six
21 hours, so it's obvious that the opening statements will
22 go into Tuesday.

23 This is fine. Okay.

24 MR. STOFFELMAYR: Thank you, Judge.

12:58:19 25 I think you just answered this question,

1 but just in case, is there any chance of starting earlier
2 on Monday so we can try to get through all openings?

3 THE COURT: Our Judges meet every few
4 months and we have one Monday morning, which is why it
12:58:36 5 was 1:00 o'clock.

6 And I think it's my obligation, absent an
7 absolute emergency, to be at Judges meetings. We make
8 important decisions. I think we're going to probably
9 discuss COVID procedures, among other things.

12:58:52 10 And I think again obviously if someone gets
11 sick, you have an emergency, okay, but that's why I
12 scheduled this at 1:00 o'clock, and I'm going to continue
13 with that.

14 MR. STOFFELMAYR: Okay. Just thought we'd
12:59:09 15 ask in case your schedule changed.

16 THE COURT: We normally start at 9:00 in
17 the morning, but I think I said it is a regularly
18 scheduled meeting and it is going forward so.

19 MR. STOFFELMAYR: Thank you.

12:59:18 20 THE COURT: All right. We have an issue
21 now over the admissibility of prior -- prior settlements
22 of at least three of the defendants with Government
23 entities, and there was a motion for reconsideration and
24 a response in opposition.

12:59:52 25 All right. My prior ruling was accurate,

1 but -- and I'm not changing it, but my prior ruling
2 didn't address the admissibility of any individual
3 settlement. It was in the abstract.

4 All right. I'm not -- I didn't blanket
13:00:10 5 admit them all, and I'm sure as heck not blanket denying
6 them all, so the parties submit -- you know, briefs don't
7 help me at all.

8 I need to know specifically which prior
9 settlement agreements against which defendants, which of
13:00:27 10 the defendants, the plaintiffs are seeking to introduce,
11 either through a live witness or through a witness being
12 offered by deposition, and who those witnesses are. And
13 then I'll figure out -- you know, I may have to deal with
14 them, each one. I don't know.

13:00:51 15 Because again, they're not -- they can't be
16 offered for the truth of the matter asserted. They're
17 not, you know, an admission. All right. It may be
18 relevant for notice, notice, notice and intent, and
19 depending on how the questions go.

13:01:12 20 So I guess, Mr. Lanier, do you have a list
21 or can you supply a list to me and the defendants of
22 which agreements you're seeking to introduce and through
23 which witness, live witness and deponent witnesses?

24 MR. LANIER: Yes, Your Honor, I can supply
13:01:27 25 that list to the Court.

1 Tell me -- and the other side. Tell me
2 when you want the list.

3 THE COURT: Well, and I'm -- I think it
4 would be best if you not refer to these settlements in
13:01:37 5 your opening statements because at this point no one
6 knows which are coming in and which aren't.

7 And again if you refer to them in opening
8 statements, I'm afraid it's going to sound like the jury
9 should take these statements in some way as substantive
13:01:55 10 evidence of wrongdoing. And that would be an
11 impermissible hearsay use.

12 A permissible use, I mean it seems to me
13 you can question an executive about a settlement and
14 whether, whether that influenced the company's policies
13:02:13 15 going forward in any way, shape or form. And if so,
16 fine. If not, why.

17 I mean, I think that's -- you know,
18 settlement is a fact and it's really what the defendants
19 did or -- did or didn't do as a result. Okay. And so
13:02:29 20 there's an argument that, you know, no Court's admitted
21 ten settlements. I mean, candidly, ten settlements
22 against a company in a five-year period could be far more
23 probative than one. I mean, one is one. But if you have
24 ten, you've -- and they are similar and similar to the
13:02:46 25 conduct here, well, it looks like the company just blew

1 them off.

2 So I think it's best that you not refer to
3 them in opening until I know exactly what they are and we
4 know, and then I'll figure out -- I will start taking a
13:03:03 5 look at how, you know, how you are planning to use them,
6 and maybe just set some general guidelines.

7 But in the abstract, I mean, I'm not -- I
8 haven't admitted them all, and I'm certainly not going to
9 just randomly say they're all admissible, and I'm
13:03:20 10 certainly not going to say -- take the defendants'
11 position that none of them are admissible or can't be
12 used in any way, shape or form. I'd be summarily
13 reversed if I did either one.

14 MR. LANIER: Your Honor, for clarity's
13:03:35 15 sake, first of all, I'll do exactly as you say, number
16 one.

17 Number two, I do want the record to reflect
18 and it to be fresh in your mind that Walgreen's and two
19 of the CVS settlements do actually have admissions.

13:03:46 20 THE COURT: All right. An admission, if
21 there's an admission, I think an admission, you know, I
22 don't think the defendants -- I mean, they may not be
23 happy with it, but if it's an admission, it's an
24 admission. As long as it's something directly related to
13:03:59 25 what we have here. If it's something unrelated, then

1 it's just prejudicial.

2 If they admitted they did something wrong,
3 that's far more prejudicial than probative, so I'd like
4 to know which had admissions and what the admissions are.

13:04:14 5 MR. LANIER: Your Honor, by the time we
6 start jury selection tomorrow, I'll have you a list of
7 the ones --

8 THE COURT: Okay.

9 MR. LANIER: -- that I had planned on
13:04:20 10 referring to, and I'll segregate out the ones that had
11 admissions and what they are.

12 THE COURT: Okay. And give that to
13 defendants, and then we can look at those.

14 All right. When we start examining
13:04:36 15 witnesses, am I correct, Mr. Lanier, that you're going to
16 have just one lawyer, one plaintiffs' lawyer per witness?

17 You know, of course, we have two counties,
18 we have two parties, you know, Lake County and Trumbull
19 County.

13:04:53 20 You're not going to have one Lake County
21 lawyer and one Trumbull County lawyer examining each
22 witness.

23 MR. LANIER: You are correct, Your Honor.
24 We will have one lawyer per witness.

13:05:03 25 THE COURT: Okay.

1 MR. LANIER: The interests are aligned.

2 THE COURT: Well, that's what I figured.

3 Okay. So what I'm going to do after

4 direct, I'm just going to turn to the defense for

13:05:12 5 cross-examination, and you can have whatever order you

6 want. And I am assuming that you've decided that, you

7 know, Walgreen's is going to take the lead on certain

8 witnesses and Walmart on others, and that's fine.

9 And so when that lawyer finishes, I'll

13:05:29 10 just, you know, ask if any of the other defendants want

11 to cross-examine. And if you do, fine. If you say

12 "Nothing further," that's fine.

13 MR. STOFFELMAYR: Thank you, Judge.

14 THE COURT: All right. And at that point

13:05:43 15 I'm going to see if any of the jurors have questions,

16 written questions. And the procedure is they reduce it

17 to writing, they hand it to my courtroom deputy. I'll

18 see them eventually, but I don't care. The courtroom

19 deputy will hand it to counsel so you can quickly look at

13:06:00 20 it.

21 And the idea -- and I'll tell the jurors

22 that they're not to, you know, if their question isn't

23 asked or isn't asked right away, they are not to blame

24 anyone. There could be a whole lot of reasons. One, it

13:06:14 25 might not be relevant. Two, it might be more appropriate

1 for another witness who is coming, and the lawyers know
2 that so they will ask that witness.

3 And you can ask it on your -- on the
4 follow-up round, either recross, redirect or recross, or
13:06:28 5 not. But that way you all know that one juror had a
6 question and, you know, I think that's -- I think that
7 makes for a more intelligible trial and so you know what
8 the jurors are thinking.

9 And then it will just be one round of
13:06:45 10 redirect and recross.

11 I plan to address the admission of exhibits
12 at the conclusion of each day. If I wait until the end,
13 we won't be able to keep track of them so I'll address
14 those each day.

13:07:04 15 I'm assuming virtually all the exhibits are
16 coming in without objection. I'm not going to waste time
17 on authenticity. If there are, get those ironed out
18 beforehand.

19 Have you discussed with Mr. Pitts a vehicle
13:07:18 20 for making admitted exhibits publicly available? Has
21 that been worked out?

22 MR. STOFFELMAYR: Judge, Kaspar Stoffelmayr
23 again for Walgreen's.

24 We did receive Mr. Pitts' e-mail and we
13:07:31 25 passed that on to the right people on our teams, and as

1 far as I know they know what to do.

2 THE COURT: Okay.

3 MR. STOFFELMAYR: When the tech people are
4 here tomorrow they can ask questions, if that's all
13:07:41 5 right.

6 THE COURT: There's another tech setup
7 tomorrow?

8 What time?

9 MR. STOFFELMAYR: I may be confused on
13:07:46 10 that.

11 THE COURT: We are all going to be picking
12 the jury on 19.

13 MR. STOFFELMAYR: I may be wrong. I
14 thought there was another tech day.

13:07:55 15 THE COURT: I thought that was all
16 yesterday.

17 Robert, has that all been worked out?

18 MR. STOFFELMAYR: I stand corrected.

19 THE COURT: Has that all been worked out?

13:08:04 20 THE CLERK: There may be some remaining
21 things to take care of while we are picking the jury.

22 THE COURT: Well, as long as it's taken
23 care of. You know, you can come in, but I don't know
24 what tech thing.

13:08:15 25 This is simply you're going to

1 electronically put them on the Court website, whatever,
2 so the media, whatever, you know, can have access to the
3 exhibits. Just make sure that happens.

4 MR. STOFFELMAYR: And again, I think
13:08:27 5 everyone has Mr. Pitts' e-mail address and they will
6 address any questions to him, but it sounds like it's
7 straightforward enough.

8 THE COURT: All right.

9 There's been some back and forth
13:08:37 10 correspondence on some edits or changes to the voir dire
11 questions I'm going to ask and the preliminary jury
12 instructions.

13 All right. Let's start with the voir dire
14 questions.

13:09:23 15 I guess this, this is on the last paragraph
16 on Page 2 is where we've had a lot of back and forth.

17 All right. I think this is what I'm going
18 to say. The pharmacy defendants -- and this is simply a
19 summary of the pharmacy defendants' claims, that's all it
13:10:07 20 is.

21 The pharmacy defendants deny the counties'
22 claims that they caused a public nuisance, period. The
23 defendants contend that they complied with their legal
24 obligations, violated no duties, and that if a public
13:10:24 25 nuisance exists today in the two counties, it was caused

1 by persons other than the pharmacy defendants.

2 Do you want to say "persons or entities" or
3 do you just want "persons"?

4 MR. HARRIS: Your Honor, Alex Harris for
13:10:42 5 Walgreen's.

6 "Persons" is language that was used in
7 other instructions and so we would like that for
8 consistency.

9 THE COURT: All right. I will say that
13:10:56 10 "Other than the pharmacy defendants." So that's what
11 we'll say, so we'll make that change.

12 Are any of the client reps going to be
13 present at voir dire? Because if so, I would introduce
14 them. If not, then I obviously won't. But I want the
13:11:20 15 jurors to know who is at counsel table.

16 MR. LANIER: Your Honor, Mark Lanier for
17 plaintiffs.

18 We're glad to bring them in. They are here
19 today.

13:11:29 20 THE COURT: You don't have to.

21 MR. LANIER: We think that with the number
22 of people already in the courtroom, it makes sense not
23 to.

24 THE COURT: Okay. That's fine.

13:11:37 25 What about defendants, are you going to

1 have client reps at the jury -- the voir dire?

2 MR. STOFFELMAYR: Judge, no, not during
3 voir dire.

4 THE COURT: All right. Fine.

13:11:47 5 Remind me, I guess the beginning of the
6 trial I'll indicate that there may be client
7 representatives at some time.

8 I don't -- unless -- if the parties want me
9 to introduce a client rep each day, I mean, or if there's
13:12:05 10 a different client rep, I can do that.

11 If you don't, I'll just say it generally
12 and, you know, I don't know if the jurors -- they'll
13 certainly, by the middle of the trial they will know who
14 the lawyers are and they may suspect someone who is not
13:12:19 15 talking may be the client rep, or they may not care.

16 But if you want me to introduce those
17 people, I'm happy to do it. Just pass me a note and I'm
18 happy to do it.

19 MR. DELINSKY: Your Honor.

13:12:33 20 THE COURT: Yes.

21 MR. DELINSKY: May I inquire about a
22 related issue? But I don't mean to knock you off your
23 agenda, so it can wait.

24 THE COURT: Well, let me just see.

13:12:59 25 Special Master Cohen, is there anything,

1 anything that needed to be changed in the preliminary
2 jury charge?

3 It's the same, we're going to say the same
4 thing, so Page 10 of the preliminary jury charge will say
13:13:17 5 exactly the same, it will be exactly the same paragraph.

6 All right. Okay. Sorry.

7 Now you can go. I didn't want to forget
8 that.

9 MR. DELINSKY: I apologize for
13:13:46 10 interrupting, Your Honor.

11 THE COURT: Not at all, Mr. Delinsky. I'm
12 just an old guy and I don't want to forget something.

13 Okay.

14 MR. DELINSKY: Eric Delinsky on behalf of
13:13:54 15 CVS.

16 And, Your Honor, I just wanted to inquire
17 if we might be able to reserve, at least for the first
18 few days of trial but preferably for the entire trial,
19 one seat in the gallery for CVS for an additional client
13:14:11 20 representative, depending on the moment, or an additional
21 attorney.

22 It's more important, Your Honor, for the
23 first day two and three. Thereafter, we make the request
24 but it's not as important.

13:14:30 25 We understand the competing balances on the

1 Court's plate with the gallery.

2 THE COURT: It's essential they be in this
3 room rather than an overflow room?

4 Anyone in the overflow room will see and
13:14:42 5 hear exactly the same thing, and they are obviously not
6 going to be able to pass you a note from back there,
7 Mr. Delinsky, at least during -- you know, wait until a
8 break.

9 I'm not being facetious but I -- you
13:14:59 10 know --

11 MR. DELINSKY: It's a fair, it's a fair
12 point, Your Honor, and I think for openings and I think
13 Your Honor's probably aware that a CVS witness will be
14 the first witness called in plaintiffs' case, through the
13:15:13 15 duration of that witness's testimony, we do make the
16 request for an extra seat here in the courtroom, in the
17 gallery.

18 We obviously can be flexible thereafter.

19 THE COURT: All right. I'll tell you
13:15:28 20 what --

21 MR. WEINBERGER: Your Honor, we have one
22 concern.

23 I assume there's going to be a separation
24 of witnesses in this -- order in this.

13:15:34 25 THE COURT: Yes.

1 MR. WEINBERGER: And so multiple -- you
2 can't have multiple client representatives who also they
3 intend to call as witnesses, and violate the separation
4 of witness rule.

13:15:48 5 MR. DELINSKY: They are calling our
6 witnesses, Your Honor.

7 THE COURT: All right. That's a good
8 point.

9 I mean, I don't -- I haven't discussed
13:16:01 10 that.

11 Mr. Weinberger, what if one of the client
12 reps is a witness? I mean, is that -- so the client rep
13 can't be a witness, the person who is sitting in the
14 courtroom?

13:16:12 15 MR. WEINBERGER: I believe the general
16 procedure is that you have to -- the party has to
17 designate who the client representative is going to be
18 for the entire trial.

19 THE COURT: Well --

13:16:22 20 MR. WEINBERGER: And to the extent -- and
21 they can't, they can't have another client representative
22 interchangeably when that client representative is a
23 witness.

24 THE COURT: All right. Well, that -- those
13:16:33 25 are two issues.

1 I haven't insisted that Walmart, if Walmart
2 wants to have a client rep, that it has to be the same
3 person every day.

4 The person might have --

13:16:47 5 MR. WEINBERGER: No, I understand.

6 THE COURT: They may have some duties at
7 Walmart some of those days. Okay?

8 So I'm not going to insist -- same with
9 Lake and Trumbull County. I mean, for gosh sakes,
13:16:58 10 somebody might have to do something for Lake and Trumbull
11 County on October 30th and that's more important, but you
12 can have different client reps.

13 The issue of whether you can have a client
14 rep who's going to testify is different.

13:17:14 15 MR. WEINBERGER: That was the point I was
16 trying to make, Your Honor.

17 THE COURT: And that, I guess, could go
18 both ways.

19 MR. WEINBERGER: For sure.

13:17:21 20 THE COURT: The same rule is going to apply
21 both ways.

22 I mean, have you talked about that? What
23 are you proposing?

24 MR. WEINBERGER: If you're asking have we
13:17:36 25 talked about -- have the plaintiffs talked about that

1 with the defendants, the answer is no.

2 THE COURT: Well, we better talk about it
3 now.

4 I mean, our -- are the plaintiffs planning
13:17:47 5 to have client reps sitting at counsel table who
6 are -- who are going to be witnesses?

7 MR. WEINBERGER: The answer is no.

8 THE COURT: All right. What about the
9 defendants?

13:18:03 10 MS. SULLIVAN: Your Honor, Diane Sullivan
11 for Giant Eagle.

12 I believe the law is, Your Honor, that you
13 can designate one corporate rep who can also be a
14 witness.

13:18:11 15 THE COURT: I thought that was the -- I
16 mean, I've done that in criminal cases where the case
17 agent is almost always going to be a witness and he or
18 she is sitting at the Government's table, and clearly,
19 well, the defendant obviously has to be present for
13:18:26 20 constitutional reasons, whether he testifies or not.

21 MR. MAJORAS: Your Honor.

22 THE COURT: Yes.

23 MR. MAJORAS: John Majoras for Walmart.

24 If I may make a proposal, I'm only making
13:18:42 25 it on behalf of Walmart because I haven't talked to my

1 colleagues.

2 As Ms. Sullivan pointed out, if -- in terms
3 of if we were to identify an individual client rep who is
4 the single client rep who may be sitting at counsel
13:18:53 5 table, that, that client rep, I believe as Ms. Sullivan
6 pointed out, it would be appropriate that they could
7 testify at times.

8 If there are other client reps that may
9 come in and out of trial, then I don't think anyone is
13:19:03 10 proposing that those individuals would be someone who
11 would testify.

12 THE COURT: All right. Well, that seems to
13 be -- that to me is consistent with my understanding,
14 that each side may have a client rep. The client rep
13:19:22 15 doesn't have to be the same client rep every day of the
16 six weeks, and you don't have to have a client rep every
17 day.

18 But you can only have one client rep who's
19 going to be a witness. Okay? So I think that's a fair,
13:19:43 20 fair way to deal with it.

21 I think that covered the things on my, on
22 my list.

23 MR. MAJORAS: Your Honor.

24 THE COURT: Yes.

13:20:04 25 MR. MAJORAS: John Majoras again.

1 Going to the very mundane here, I know
2 there's been --

3 THE COURT: Nothing is too mundane,
4 Mr. Majoras.

13:20:12 5 MR. MAJORAS: This one is not because it
6 involves lunch breaks.

7 We understand that the courtroom cafeteria
8 is closed, which is a potential hardship for the jurors.

9 THE COURT: Right.

13:20:20 10 MR. MAJORAS: And we didn't know whether
11 that might have some impact on how your typical daily
12 schedule might be, and if you've got -- got any thoughts
13 on that or any changes.

14 THE COURT: Well, the cafeteria is closed
13:20:32 15 and I actually tried to do something about that,
16 Mr. Majoras.

17 Judges' powers are sometimes limited.
18 We'll leave it at that.

19 I typically give an hour for lunch. I
13:20:52 20 mean, I think a lot of jurors may end up bringing their
21 lunches. I mean, Tower City is open.

22 I think I'm going to start with an hour for
23 lunch, and if it turns out that just doesn't work, we'll
24 make it an hour and 15 minutes.

13:21:10 25 I mean, I -- you know, I've thought about

1 that, and I think there are pluses and minuses.

2 But if we have to make it an hour and 15
3 minutes, that's fine. I mean, I'm going to be doing
4 other Court, Court proceedings obviously remotely, I
13:21:30 5 expect, during the lunch hour, so I think we'll start
6 with an hour, but if it -- if it's just not working,
7 we'll make it an hour and 15 minutes.

8 That's not mundane at all. I mean, I've
9 given that a lot of thought, and I -- I tried, I really
13:21:47 10 worked -- was working on the courthouse cafeteria the
11 last couple weeks.

12 MR. LIVINGSTON: Your Honor, one last issue
13 I wanted to bring up.

14 We're prepared to argue our pending motion.
13:22:01 15 Giant Eagle filed a motion to strike the plaintiffs' DEA
16 experts.

17 THE COURT: I understand that.

18 But the plaintiffs have a response that's
19 due soon, and, you know, I've read it very carefully. I
13:22:17 20 think I understand your argument. I think you -- but I'm
21 not going to rule on it without giving the plaintiffs an
22 opportunity to respond.

23 MR. LIVINGSTON: Fair enough, Your Honor.
24 I just didn't know if you wanted to hear arguments.

13:22:30 25 THE COURT: I'm sure they would be very

1 eloquent, Mr. Livingston, but the motion is very clear.
2 All right. It's clear, succinct. I understand it very
3 well. I understand what the purpose of errata sheets
4 are, but I want to see if -- what the plaintiffs say.

13:22:47 5 So when -- when will we get a response to
6 that?

7 Again, Mr. Livingston, which witness was
8 that?

9 MR. WEINBERGER: Mr. Rafalski, Your Honor.

13:23:06 10 THE COURT: Rafalski, got it.

11 MR. LIVINGSTON: The DEA, and the only
12 urgency is we need to know before the openings because it
13 involves what is the scope of plaintiffs' claim against
14 Giant Eagle.

13:23:16 15 THE COURT: I understand that.

16 Well, I was definitely going to rule on it
17 this week, but when will the plaintiffs' response be?

18 MR. WEINBERGER: We'll have a response by
19 the end of the day tomorrow, Your Honor.

13:23:32 20 THE COURT: Okay. Well, I will -- I will
21 rule on it this week, Mr. Livingston.

22 Anything else?

23 Yes, Mr. Lanier.

24 MR. LANIER: Thank you, Your Honor.

13:23:54 25 If I could ask a couple of mechanics

1 questions, make sure we're doing this right.

2 It was indicated to us, I think, at the
3 walk-through that we could approach you with the idea, as
4 long as all parties agreed to it, that we might be able
13:24:11 5 to do opening from somewhere around here, recognizing
6 that we may have two jurors outside of the box there and
7 two outside of the box there, which makes it a little
8 more difficult to give the opening from the back.

9 I got a call from Mr. Hyne, last night --
13:24:29 10 Hynes, excuse me, I forgot the S -- telling me that all
11 of the defendants agreed that this would be a good thing
12 to do.

13 THE COURT: That's okay.

14 MR. LANIER: So is that okay with the
13:24:38 15 Court?

16 Thank you, Your Honor.

17 THE COURT: Yeah, my only -- the only
18 place -- I don't want you crowding the jurors. I've seen
19 some lawyers who go, like, right up into the jury and
13:24:46 20 it's not -- it makes them uncomfortable because they
21 can't move.

22 But I'm fine. We'll have two -- what I'm
23 going to do is seat the jurors in every other seat for
24 obvious reasons, so we'll do a little zigzag and have a
13:25:07 25 couple on each end for a total of 14.

1 So this is fine.

2 MR. LANIER: Okay. Second, Your Honor, in
3 terms of practicalities, how do we -- how would the Court
4 like us to pass documents to witnesses and the other
13:25:27 5 side?

6 I've got an idea, but if the Court's got
7 direction already, I'll shut up on my idea.

8 THE COURT: Well, let's hear your idea.

9 MR. LANIER: I categorize witnesses into
13:25:40 10 two groups: Those that I will be putting on directly and
11 those that I'll be cross-examining.

12 For cross-examination, because of the
13 element, to some degree, of surprise or not prepped, it
14 seems to me both sides with their cross-examination
13:25:59 15 documents, if we just brought a set that had numbered
16 folders with the documents already open so that it's easy
17 to do, and just kept a box up there. Knowing what we
18 were going to be using the next day, we'd put it down
19 there in the morning and the witness has got it. We give
13:26:13 20 a box to the other side, they've got -- or to each side,
21 they've got them.

22 That would work for cross-examination so
23 that the lawyer could just say, "Ma'am" or "Sir, would
24 you please pull out folder number 7? And, Your Honor,
13:26:27 25 this is a document we would mark as Plaintiffs' Exhibit

1 blah, blah, blah that we tender at this time."

2 THE COURT: Seems like a good idea.

3 MR. LANIER: Just it minimizes walking back
4 and forth.

13:26:38 5 THE COURT: Right.

6 The other option is, you know, you might
7 put it on the screen and then you don't have to
8 actually -- but so you can either put it on the screen,
9 or I think I like that idea of having a box and just say
13:26:50 10 pull file seven.

11 MR. LANIER: Okay.

12 THE COURT: Okay.

13 MR. LANIER: Then with those witnesses that
14 we've got on direct, the Rules say that the night before
13:26:59 15 we need to provide the other side with a list of
16 documents that we would be using on direct. It allows
17 them to know the scope.

18 THE COURT: Right.

19 MR. LANIER: And those, it seems to me, we
13:27:08 20 can make sure our own witnesses have their documents.

21 THE COURT: Sure. You just have them up
22 there.

23 MR. LANIER: Exactly.

24 THE COURT: I've done that. That's -- I
13:27:15 25 always did that, you know, years before. I never thought

1 of COVID. Documents are up there, either in a binder or
2 whatever.

3 MR. LANIER: Exactly.

4 THE COURT: Okay.

13:27:27 5 MR. LANIER: Thank you.

6 THE COURT: Of course, you can put them on
7 the Elmo and it pops up on everyone's screen, including
8 your witness.

9 MR. LANIER: Yeah. And I'm sure we'll do a
13:27:34 10 lot of that, but some of these documents that are
11 multi-page, especially on cross-examination, the
12 witnesses may want to be able to say, "I'd like to see
13 another page of that document."

14 THE COURT: That's fine.

13:27:43 15 MR. LANIER: So and then my next question,
16 Your Honor, is not having practiced in your Court, I
17 don't know what your rules are on this.

18 We are planning on calling as our first
19 witness Mr. Tom Davis who works for CVS.

13:28:02 20 We had alerted Mr. Delinsky that we would
21 use our Rule 43 -- he was our Rule 43 witness -- in case
22 they wanted to bring him live and gave him a week or so
23 warning, and Mr. Delinsky got back to us and said he will
24 be live in the courtroom, which makes it real easy.

13:28:19 25 So we anticipate, I anticipate putting him

1 on first. He obviously is a significant person within
2 CVS, and is a hostile witness or, as we call them, an
3 adverse witness.

4 THE COURT: "Adverse" is a better word.

13:28:35 5 MR. LANIER: Okay. Thank you.

6 I would assume then that I'm able to
7 cross-examine him, but I just wanted to -- and ask
8 leading questions, but I just want to make sure that
9 there's not a difference here that because I call him in
13:28:49 10 my case in chief even though he's adverse I'm not allowed
11 to ask leading questions, if that makes sense.

12 THE COURT: I think that makes sense.

13 He's clearly a party -- you know, a
14 representative of one of the defendants, so you can --

13:29:05 15 MR. LANIER: I can lead, in other words.

16 THE COURT: Yeah. And then --

17 MR. LANIER: Thank you, Judge.

18 THE COURT: -- so essentially it will be
19 flipped around, because obviously, I mean, you're
13:29:13 20 going -- you're treating him, just the cross-examination
21 is more than the direct. Obviously you're not treating
22 him as an adverse witness.

23 But I don't think it's appropriate for the
24 defendants to then ask a whole lot of leading questions
13:29:25 25 of their own witness.

1 MR. DELINSKY: Judge.

2 THE COURT: But I'm not -- I'm not
3 hypertechnical on what's leading or not.

4 MR. LANIER: Okay.

13:29:33 5 THE COURT: We've all been around the
6 block. It's almost impossible to do anything without
7 some leading, or else the trial would take forever.

8 So the only real concern is when you've got
9 someone who you don't think, unless you're leading him or
13:29:47 10 her, he's not going to testify, and then that's why you
11 don't ask leading questions.

12 So I think everyone understands that.

13 MR. LANIER: Thank you, Judge.

14 MR. DELINSKY: Your Honor.

13:29:58 15 THE COURT: Yes, Mr. Delinsky.

16 MR. DELINSKY: Your Honor, I'd love to tell
17 you that I believe Mr. Lanier is wrong, but unfortunately
18 I think the Rule says he's right, but I think the same
19 Rule also says that you can cross-examine, when you stand
13:30:12 20 up for cross, you can ask leading questions, too,
21 regardless of whom the witness is.

22 You could ask leading questions if the
23 witness is adverse; you could ask leading questions if
24 your posture is on cross. I'm not saying that will
13:30:24 25 necessarily happen with each and every witness who's one

1 of our own, but I just wanted to note that's the wording
2 of the Rule and that's the right.

3 THE COURT: Okay. Technically, you know,
4 some other defendant could say, well, you know, we're a
13:30:38 5 little bit adverse to CVS on this, and want to cross him.

6 I mean, that's understood. I mean,
7 defendants don't -- aren't always a hundred percent
8 aligned so that could come up.

9 MR. DELINSKY: I'm saying something a
13:30:50 10 little different, Your Honor.

11 And again I don't imagine -- I'm in your
12 school; I don't imagine this is going to be an issue, but
13 the person who stands up when it's your turn to cross,
14 the Rule says you can ask leading questions. It doesn't
13:31:05 15 matter if I'm crossing -- if I'm standing up to question
16 a CVS witness and Mr. Lanier already has called that
17 person, I get to ask leading questions.

18 I'm not saying I'm going to do that.

19 I'm saying that's what the Rule says, and I
13:31:16 20 just want to put down a marker that it's in the Rule.

21 THE COURT: Well, Mr. Delinsky, there's no
22 way that I'm going to allow you to question Mr. Davis in
23 the same manner that Mr. Lanier is. Okay?

24 Okay? That isn't going to happen, because
13:31:38 25 then it will be your testimony, and I want to hear from

1 the client.

2 So, you know, clearly you're always leading
3 if you're referring to what the witness already said, you
4 can point, point them and say, "You said this, what do
13:31:51 5 you mean," like that. But if you start then as you're
6 entitled to, you want to put in -- you know, I assume the
7 idea is to just call Mr. Davis once, right?

8 Or are you planning to call him again in
9 your case.

13:32:04 10 MR. DELINSKY: Just once, Your Honor.

11 THE COURT: Precisely.

12 So at some point you're going to want to be
13 bringing out things that he didn't say on direct, okay,
14 that are helpful to your case, and there it would not be
13:32:25 15 appropriate for you to be leading, okay, because that's
16 not cross-examination and you would be bringing it out as
17 if he were called as your witness.

18 And that's a different kind of questioning,
19 and at that point it's essentially your direct testimony,
13:32:38 20 exactly what you would ask him if, you know, if
21 Mr. Lanier hadn't called him and you called him as your
22 witness.

23 So I think that's the way, that's the
24 distinction.

13:32:49 25 MR. LANIER: Then, Your Honor, the last

1 thing on my list is I had assured the Court and the other
2 side that we had spare chess clocks around. I brought
3 one around to give to Mr. Pitts.

4 THE COURT: Okay.

13:33:00 5 MR. LANIER: If the Court doesn't need it,
6 I don't care, but it's just available should the Court
7 desire.

8 THE COURT: All right. Special Master
9 Cohen advised that if you're sort of moving around or
13:33:31 10 away from the lectern, you need to use the lavalier mic
11 because otherwise our court reporter won't hear you.

12 MR. LANIER: Your Honor, we had discussed
13 among the parties whether or not it would be okay to ask
14 you if we could testify -- not testify -- if we could
13:33:52 15 examine, testify or do examinations from counsel table,
16 but I think that --

17 THE COURT: You stay seated. That's fine.

18 MR. LANIER: Is that okay if we do it from
19 counsel table?

13:34:03 20 But I don't think they agreed to it. I
21 don't want to misrepresent anything.

22 THE COURT: I'm saying it's okay, all
23 right, because we're doing things a little differently
24 because of COVID, and these microphones work much better
13:34:15 25 if you're seated than if you're standing.

1 So if you want to -- if you want to do your
2 questioning from counsel table, that's fine. If you want
3 to go to the lectern, that's fine.

4 MR. DELINSKY: Your Honor.

13:34:27	5	MR. LANIER: Thank you, Judge.
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6 MR. DELINSKY: The complexity with that is
7 as I'm sitting here today, I can barely see the witness.

8 THE COURT: I'm not saying you have to,
9 Mr. Delinsky.

13:34:36 10 MR. DELINSKY: I know, but what I'm saying,
11 Your Honor, is the plaintiffs' table is the perfect real
12 estate for cross and direct examination, and unless we're
13 going to be rotating tables for particular examinations,
14 there's an element of unfairness to it that for CVS
13:34:52 15 sitting at this table to have a clean line of sight I
16 need to be, you know, it's like "My Cousin Vinny," I need
17 to be a hundred feet back there, and Mr. Lanier gets to
18 be 15 feet in front of the witness.

19 It's just not altogether fair.

13:35:07 20 MR. LANIER: Your Honor, they have counsel
21 table that's about three feet from me. If maybe they
22 could switch when they're questioning if they want to do
23 that, or I'd be glad to let Mr. Delinsky take my seat if
24 that happens.

13:35:18 25 THE COURT: Well, I don't think he should

1 be -- that's, I don't think that's great.

2 Well, I certainly don't want to be unfair
3 to anyone because of where they're seated in the
4 courtroom. That's, you know, just a happenstance.

13:35:37 5 So if, if you really feel that way, then I
6 guess we should have questioning be at the lectern, all
7 right? Obviously the microphone works well there, so do
8 the witness examination there. Jurors can see you, I can
9 see you. That's fine.

13:35:56 10 All right.

11 MR. MAJORAS: Your Honor.

12 THE COURT: Yes.

13 MR. MAJORAS: I'm sorry. John Majoras.

14 Just a follow-up on something Mr. Lanier
13:36:08 15 raised about the documents, the witnesses and we fully
16 agree with that, we think that's appropriate.

17 You had mentioned something about if
18 there's a document that may go up on video and, of
19 course, I think everyone will do that.

13:36:18 20 I just want to make sure that we're all
21 committed that the witness will always have a paper copy.
22 As you know, occasionally in a lengthy trial there's a
23 copy that's either mangled or something that has to be
24 handed up, but if we can all commit that at least the
13:36:32 25 witness will have a full paper copy so they have the

1 ability to flip through it and know what's ahead of them.

2 THE COURT: I think that's a good idea,
3 Mr. Majoras, because if you say, "Have you seen this
4 document," and all they have seen is Page 1, they may not
13:36:49 5 intelligently be able to answer that question. But if
6 they flip through it, they can say yes or no.

7 So, yes, I think that's only fair to the
8 witness. We should do that.

9 All right. Well, I think we've -- you
13:37:00 10 know, obviously there may be other things that will come
11 up, but I think we've covered everything we need to
12 cover.

13 We've got the best lawyers in the country
14 in this case. There's no doubt about it. It's a very
13:37:12 15 important case to all parties and it's a case of national
16 importance. So I'm requesting and I need everyone's
17 cooperation to ensure that this case proceeds smoothly
18 and expeditiously with a minimum of disruption.

19 So I don't want to waste time on document
13:37:32 20 authenticity. All this stuff has to be worked out in
21 advance. And we're going to start on time and so don't
22 bring up significant matters at 9:00 a.m. I'm not going
23 to hear them. We're just going to start.

24 If you've got an important issue that's for
13:37:48 25 a Wednesday witness, then bring it up at the close of

1 business Tuesday so I can address it.

2 All right? Because if someone waits until
3 Wednesday morning, I'm going to simply charge, charge
4 that side, that party with whatever time is taken up, all
13:38:06 5 right, as if you had used it on direct or cross. And
6 that's the only fair way to do it.

7 But I, you know, I want the jurors, if I'm
8 ordering them to be here so we start at 9:00, that's what
9 I want to do and take up all these other things. And
13:38:21 10 I'll tell you, I've scheduled nothing other than during
11 the noon hours, I think, with this trial, for that
12 reason.

13 So, okay, the last thing I want to say is
14 this, because we've got client reps here.

13:38:39 15 MR. MAJORAS: Your Honor.

16 THE COURT: Yes.

17 MR. MAJORAS: I'm very sorry to interrupt.
18 John Majoras again.

19 Our client rep has been texting us
13:38:45 20 throughout that she's not been able to dial in. She
21 keeps getting booted out.

22 THE COURT: I wish you would have said
23 something.

24 MR. MAJORAS: I didn't want to bring it up
13:38:53 25 during the lunch question, I didn't think it was that

1 important, but certainly for this.

2 THE COURT: All right. What's going on
3 here? Let's get the client.

4 (Discussion had off the record).

13:39:06 5 THE COURT: What dial-in number does your
6 client rep have, Mr. Majoras?

7 MR. MAJORAS: We're checking, Your Honor.

8 THE COURT: Any other client reps having
9 trouble or notifying you that they're having trouble?

13:39:24 10 MS. SULLIVAN: No, Your Honor.

11 THE COURT: Okay. Maybe she's got the
12 wrong number. It's happened to me more than once.

13 MR. MAJORAS: I'm sorry, Your Honor, we
14 can't find the number she is using.

13:39:47 15 THE COURT: Well, let's give her -- let's
16 give her the right number.

17 MR. MAJORAS: Excellent suggestion, Your
18 Honor.

19 MR. STOFFELMAYR: While we're waiting,
13:40:05 20 could I ask the most mundane question which is tomorrow
21 are we starting at 8:30 or 9:00?

22 THE COURT: 9:00 o'clock.

23 MR. STOFFELMAYR: Thank you.

24 THE COURT: 9:00 o'clock, Mr. Stoffelmayr.
13:40:16 25 Remember it's 19, 19-A. It's the ceremonial courtroom,

1 and it has a much larger gallery so we can spread our
2 jurors out.

3 (Pause).

4 MR. DELINSKY: Your Honor, while we're
13:41:58 5 waiting, may I raise another logistical issue?

6 THE COURT: Sure.

7 MR. DELINSKY: I think we may have a
8 professional disagreement on the documents the night
9 before issue, whether, by way of representative example,
13:42:11 10 if Mr. Lanier and the plaintiffs are calling a CVS
11 witness in their case, do the documents have to be shared
12 the night before?

13 Our position is yes, if it's plaintiffs'
14 witness. I don't want to put words in plaintiffs'
13:42:26 15 mouths, but I think their position is "If it's cross, we
16 don't have to."

17 THE COURT: Well --

18 MR. DELINSKY: Your Honor, and to be clear,
19 our position is they should be passed the night before.
13:42:46 20 We will do the same with their witnesses. We're not
21 asking for a one-way.

22 THE COURT: Obviously, the rule is going to
23 be the same both ways.

24 MR. WEINBERGER: Your Honor, this -- I
13:43:01 25 can't point chapter and verse to the CMOs that cover

1 this, but this is a cross-examination of a witness, of an
2 adverse witness.

3 We are not required, under, you know, the
4 procedures we've set up, to provide exhibits to that
13:43:19 5 witness or to their counsel prior to their testifying any
6 more than it was, you know, a witness who they called on
7 direct and we were cross-examining.

8 THE COURT: Well, it does seem to
9 be -- defeat any -- well, some of these people have been
13:43:46 10 deposed so you probably have a pretty good idea of a lot
11 of documents.

12 It would sort of defeat any element of
13 surprise if you're essentially cross-examining, you know,
14 a key witness for the other side, to tell that witness
13:44:01 15 and counsel all the documents you're going to use. And
16 it works the same both ways.

17 I --

18 MR. DELINSKY: Your Honor, if I may, the
19 distinction, this is a situation where plaintiffs are
13:44:15 20 electing to exercise their rights to call a witness in
21 their case in chief where there's no limit on the scope.
22 The scope's not restricted in their cross to the subject
23 matter of our direct.

24 That's what would occur in a conventional
13:44:34 25 cross, if the witness were called in our case. And under

1 those circumstances, where plaintiffs are making the
2 election, there are some limits on scope.

3 We do think it's appropriate for there to
4 be the exchange.

13:44:51 5 MR. WEINBERGER: Your Honor, there's
6 no -- if they were to call Mr. Davis under direct,
7 there's no limitation in cross-examination based upon the
8 scope of their direct examination.

9 It may be true with respect to redirect or
13:45:02 10 recross, but that's certainly not the case with respect
11 to cross-examination of a witness who they are calling on
12 direct.

13 And so under these circumstances where
14 we're calling the witness under cross as an adverse
13:45:19 15 witness, we're entitled to ask him --

16 THE COURT: Well, all right, but if that's
17 the case then, then, you know, then CVS doesn't have to
18 turn over to you any of the documents they're planning to
19 use with Mr. Davis either on their -- their examination.

13:45:37 20 MR. WEINBERGER: Well, I mean, I understand
21 what you're saying.

22 I don't think that's what our protocols
23 call for, but if that's the ruling, we're okay with it.

24 THE COURT: Well, I can't -- I mean, we've
13:45:47 25 got to have the same strike zone.

1 MR. WEINBERGER: Well --

2 THE COURT: So if you're not turning over
3 your documents on Mr. Davis, then, you know, Mr. Delinsky
4 is not going to turn over his on Mr. Davis.

13:45:59 5 If he called Mr. Davis as a witness, he
6 would have to provide those to you.

7 MR. WEINBERGER: Right.

8 Well, if they want to wait to call
9 Mr. Davis in their case and direct -- and do a direct
13:46:11 10 examination, that's fine.

11 This is no different, Your Honor. They are
12 apparently not going to call him back. They're going to
13 use the opportunity to call him to a direct
14 examination -- to directly examine him, and so they have
13:46:27 15 to follow the rules which require them to turn over the
16 documents in advance.

17 Now, for this particular witness, as long
18 as we're not setting any precedent, if for this witness
19 only that's the way the Court wishes to --

13:46:41 20 THE COURT: I'm not going to have different
21 rules for different witnesses. That doesn't make -- I've
22 never had a trial where we have different rules for
23 different witnesses.

24 MR. LANIER: Your Honor, Mark Lanier
13:46:55 25 interrupting my friend Pete to say we're fine with that,

1 Your Honor. We'll do it exactly the way you said, and
2 Mr. Delinsky does not need to give us those documents
3 early.

4 THE COURT: All right. If that's -- if
13:47:06 5 that's how you want to do it, and then if in the
6 defendants' case they're calling, you know, a Lake County
7 or Trumbull County person, then you don't have to give
8 your documents, but you're not going to get the
9 plaintiffs' documents with all the questioning of their,
13:47:27 10 you know, their persons.

11 So you'll both be doing it sort of blind.
12 If that's how you want to do it, fine. I mean, you know,
13 if everyone's comfortable with that, then that's what
14 we'll do.

13:47:41 15 MR. DELINSKY: Your Honor, I believe our
16 position is -- and I have not conferred with the other
17 defendants so we'll call it the CVS position is that we
18 believe that if a party is calling a witness in their
19 case in chief, they should disclose the documents they
13:47:58 20 intend to use the night before.

21 And that said, Your Honor, and I direct
22 Your Honor's attention to Document 3595-2, that's the
23 joint trial exhibit stipulation, and on Page 6 of that
24 document it does say, "In light of the complexity of this
13:48:16 25 litigation, the parties may use on cross-examination

1 exhibits that were not previously identified on an
2 exhibit list only if they disclose those unlisted
3 exhibits by 7:00 p.m. on the prior day."

4 Now, that's documents not on exhibit list.
13:48:34 5 It doesn't address everything I'm pointing out, but I do
6 just want to point that out.

7 THE COURT: I -- I'm not following this.

8 If this is all covered, if I've issued an
9 order that covers this, then we're going to follow the
13:48:48 10 order.

11 MR. DELINSKY: Well --

12 THE COURT: Special Master Cohen, could you
13 come up?

14 Have we covered this in an order? If the
13:48:57 15 order covers it, it's whatever I ordered.

16 SPECIAL MASTER COHEN: One and 2-A carves
17 out an exception to the rule, and I think you're right
18 that it must apply, but it's a caveat and doesn't cover
19 what the Judge just ruled otherwise.

13:49:14 20 I think everybody understands that.

21 THE COURT: I don't really care. It's just
22 going to be the same for both sides.

23 So if -- either you're going to have to
24 follow the general rule, and the general rule is if you
13:49:29 25 call a witness in your case in chief, you provide the

1 documents you're going to use the night before, that's
2 the general rule.

3 Mr. Weinberger has said that he wants an
4 exception to that, that if either side is calling an
13:49:44 5 adverse witness, a party, some party rep of the other
6 side in its case in chief, then you don't have to turn
7 over the documents.

8 And I want to see if that's -- you know, if
9 that's agreeable to defendants. So we'll carve that out.
13:50:06 10 If it's not, then we'll go back to the, you know, default
11 is that you have to turn them over whether it's your
12 witness or not.

13 MR. DELINSKY: That's not agreeable for
14 CVS.

13:50:26 15 We would prefer that the general rule --

16 THE COURT: All right. We'll go back to
17 the order that I've got in place is that if you call a
18 witness, whether it's your witness, it's the other
19 parties' witness, you're calling him or her in your case
13:50:42 20 in chief, you've got to turn over the documents.

21 MR. LANIER: Your Honor, if I could, I've
22 got your order, I've got the joint trial stipulation in
23 front of me, and it doesn't say whether you call the
24 witness or not.

13:50:53 25 The rule is simple because we negotiated

1 this exhaustively, "Direct examination documents have to
2 be disclosed by 7:00 p.m. the day before.

3 Cross-examination documents do not unless the
4 cross-examination document is not on the exhibit list."

13:51:13 5 If you've come up with a new one not on the
6 exhibit list, you need to disclose it so the other side
7 has it. But it's not did you call the witness, it's
8 direct examination or cross-examination because you don't
9 provide cross-examination documents to the other side to
13:51:29 10 prepare their witnesses to handle and to -- to, you know,
11 get their trial prep going.

12 Once the witness is on the stand, we can
13 provide them because the rule is the lawyers can't talk
14 to the witness once they've started testifying.

13:51:46 15 But what you've already got in place is not
16 what Mr. Delinsky has indicated. It divides between
17 direct examination documents and cross-examination
18 documents.

19 MR. DELINSKY: Your Honor.

13:51:55 20 THE COURT: All right. If we've done it,
21 then we're going to stick with that.

22 So it goes the same way, if you're calling
23 in your case in chief a Lake County or Trumbull County
24 person, you don't have to turn over your documents,
13:52:08 25 Mr. Delinsky. You can cross-examine them cold.

1 MR. DELINSKY: Your Honor, I believe we're
2 conflating direct examination and leading questions.

3 THE COURT: Well, I mean it's -- if you're
4 calling a party rep of, you know, the other side,
13:52:22 5 obviously it's an adverse witness and you can -- I've
6 already said you can cross-examine that person.

7 MR. DELINSKY: But, Your Honor, I think --
8 not to put words in the Court's mouth -- I think what the
9 Rule says is you can ask leading questions. It doesn't
13:52:35 10 convert it to a direct examination, a direct examination
11 to a cross-examination.

12 This witness, by way of example here, to
13 bring it down to brass tacks is going to be the first
14 witness to testify in the courtroom, that's a direct
13:52:52 15 examination and leading questions are allowed, but the
16 documents have to be produced.

17 THE COURT: I mean, if you're examining the
18 witness as on cross, it's cross-examination. That's what
19 it means. If you're examining them as direct, it's
13:53:12 20 direct.

21 And so the presumption is if it's an
22 employee of an opposing party, I've already said you
23 can -- you can essentially do cross-examination when you
24 call him or whether the other side calls him.

13:53:29 25 So it's cross-examination. So that's how

1 we'll treat it then. So you don't have to turn over the
2 documents.

3 Now, but that suggests that if then, if
4 then the other side wants to bring out a whole lot of
13:53:46 5 direct examination with that witness and you're planning
6 to do that, then you have to provide those because you
7 know you're going to be conducting direct examination,
8 say, of Mr. Davis. You've got a whole lot of direct
9 examination of Mr. Davis, it's a lot more efficient just
13:54:02 10 to do it now and not call him a second time, well, then
11 you've got to provide those. All right?

12 And they have to do the same thing. If you
13 call a Lake County official, you don't have to provide
14 any of your documents, Mr. Delinsky, on the Lake County
13:54:16 15 official. But if Mr. Lanier then is going to bring out a
16 whole lot of direct testimony from that Lake County
17 official, the same questions you would ask that person if
18 he called him in the case in chief, he's got to provide
19 those documents to you the night before. So you'll see
13:54:33 20 that because that's direct testimony that he's going to
21 do.

22 The fact he does it second doesn't make
23 it -- doesn't change anything. The order doesn't change
24 anything.

13:54:42 25 So that's what we'll do.

1 All right. Has the Walmart --

2 MR. MAJORAS: Yes, Your Honor. Apologize
3 for that delay, but she has been able to join.

4 THE COURT: She has heard some
13:54:53 5 scintillating --

6 MR. MAJORAS: I'll fill her in on the lunch
7 discussion, Your Honor.

8 THE COURT: -- dialogue here.

9 All right. I believe that there eventually
13:55:06 10 will be a global resolution involving some or all of
11 these pharmacies as there are with many of the other
12 defendants, and the ones who aren't, there are active
13 discussions going on.

14 I believe that trying this case to
13:55:20 15 conclusion will make resolution harder. That's my
16 opinion. All right?

17 And if this case is tried to conclusion,
18 we'll almost certainly need to try the other five
19 bellwethers to conclusion, and that's another year or
13:55:36 20 more.

21 So I'm urging all sides, both plaintiff
22 counties, the four defendants, and this is for the
23 clients, all right, evaluate the witnesses and evidence
24 as it comes in. All right? And use this trial as an
13:55:50 25 opportunity to engage in the kind of meaningful

1 discussions that have not happened over the last couple
2 of years, all right?

3 My daytime hours are obviously going to be
4 occupied, as all of yours are, but I'm available on the
13:56:05 5 weekends and evenings if people need my help. But this
6 is for the clients listening in, Lake County and Trumbull
7 County officials and the officials from the four
8 defendants.

9 So that about concludes it right on time,
13:56:25 10 so we'll see everyone tomorrow at 9:00 a.m. in 19-A.

11 MS. SULLIVAN: Thank you, Your Honor.

12 MR. MAJORAS: Thank you, Your Honor.

13 THE COURT: All right.

14 (Proceedings concluded at 1:56 p.m.)

13:56:38 15 - - - -

16 C E R T I F I C A T E

17 I certify that the foregoing is a correct
18 transcript from the record of proceedings in the
19 above-entitled matter.

20
21 /s/Susan Trischan

22 /S/ Susan Trischan, Official Court Reporter
23 Certified Realtime Reporter

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